Supreme Court, U.S.
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No. 02-1709

IN THE

Supreme Court of the United States

NICHOLAS LASSONDE,

Petitioner,

v.

PLEASANTON UNIFIED SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner was selected by public school officials to present a speech at his public high school commencement. The school controlled all aspects of the graduation including control over the content of Petitioner's commencement presentation. The public school authorities prevented the Petitioner from delivering a Christian sermon in his speech. This matter presents the following questions:

1. Whether public schools officials can properly prevent a student speaker from engaging in blatant sectarian Christian proselytizing at a public high school sponsored and controlled graduation ceremony in order to avoid violation of the Establishment Clause.[1]

2. Whether public school officials can avoid violation of the Establishment Clause by issuing a writing disclaiming religious endorsement under these facts.

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1. This question was answered affirmatively by the Ninth Circuit in *Cole v. Orville Union High School District*, 228 F.3d 1092 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1228 (2001).

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STATEMENT OF THE CASE

A. Nature Of The Case

Petitioner was a chosen speaker at a public high school graduation ceremony whose speech was censored and redacted because and to the extent that it contained Christian Proselytizing. Petitioner filed this action claiming that the actions of the school and it's official violated his constitutional rights to free speech and religious freedom contrary to the provisions of 42 U.S.C. § 1983 and State Law.

B. Counter Statement Of Facts

While Petitioner's rendition of the facts in this matter is generally accurate, it omits significant facts, which have a bearing both on the questions presented and on the statement of facts upon which the petition is based. This case was decided at the trial court level on defendant's motion for summary judgment. The trial court based its decision upon the lack of a genuine dispute as to the material facts before it. *Lassonde v. Pleasanton Unified School District*, 167 F. Supp. 2d 1108, 1110 (N. Dist. Cal. 2001), App. B3. The trial court very briefly summarized the facts undisputed by the parties. *Lassonde*, 167 F. Supp. 2d at 1109-1110, App. B1-B3. In it's de novo review, the appellate court did the same. *Lassonde v. Pleasanton Unified School District, et al.*, 320 F.3d 979, 981-83 (9th Cir. 2003), App. A2-A5. Petitioner did not ask either the trial court or the appellate court to review its factual findings and has made no claim of error in that respect.

As the trial and appellate courts found, the school district and it's principal maintained control over all aspects of the graduation ceremony, including primary control of the content of graduation speeches. *Lassonde*, 320 F.3d at 981, App A2; *Lassonde*, 167 F. Supp. 2d at 1112, App. B8.

The Petitioner's "questions presented" suggest that the Petitioner maintained "primary control" of the content of his graduation speech. The record clearly shows to the contrary. The control of the contents of all graduation speech, the control of all aspects of the graduation, the presentation and promotion of the graduation ceremony in all other aspects were fully and firmly in control of the Respondents.

Petitioner also suggests that his speech was merely a presentation of a "religious viewpoint" which expressed Petitioner's desire for his fellow graduates to "develop a personal relationship with God through Christ in order to better their lives." Petitioner's questions presented, II; Petition at page 3; Petitioner's District Court Complaint, ¶19, App. D6. This statement mis-characterizes the facts. The portions of Petitioner's speech, which district officials excised, were as follows:

> I urge you to seek out the Lord, and let Him guide you. Through His power, you can stand tall in the face of darkness, and survive the trends of "modern society."
>
> As Psalm 146 says, "Do not put your trust in princes, in mortal men, who cannot even save themselves. When their spirit departs, they return to the ground; on that very day their plans come to nothing. Blessed is he whose help is the God of Jacob, whose hope is in the Lord his God, the Maker of heaven and earth, the sea and everything in them-the Lord who remains faithful forever. He upholds the cause of the oppressed and gives food to the hungry. The Lord sets prisoners free, the Lord gives sight to the blind, the Lord lifts up those who are bowed down, the Lord loves the righteous. The Lord watches over the alien and

> sustains the fatherless and the widow, but he frustrates the ways of the wicked". . .
>
> . . . "For the wages of sin is death; but the gift of God is eternal life through Jesus Christ our Lord." Have you accepted the gift, or will you pay the ultimate price? . . .

Lassonde, 320 F.3d at 981, App. A2-A3; D15-D16.

This can hardly be described as merely expressing a "religious viewpoint". Nor can this proposed speech be merely described as "Petitioner's desire for his fellow graduates to . . . better their lives." Rather these statements are the sort of material one might expect to hear from a christian pulpit, as a call to the faithful to follow their beliefs, but not from the platform of a public high school commencement ceremony as a call to join and follow the speaker's sectarian belief.

Finally, Petitioner did in fact distribute the full text of his speech outside of the ceremony as the Respondents agreed that he could so that he was able to deliver his message without the appearance of school district imprimatur of its clearly religious content. App. A4, B3.

C. Procedural History

The Petitioner's statement of the procedural history of this matter is largely correct.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Between The Circuit Decision In This Matter And The Provisions Of 20 U.S.C. § 7904

Petitioner proposes an imaginary conflict between the Ninth Circuit ruling in this case and the provisions of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, as found in 20 U.S.C. § 7904(a). The gist of the Petitioner's argument on this point is that the Ninth Circuit's decision is directly contrary to the "guidance" issued by the Department of Education pursuant to 20 U.S.C. § 7904(a) such that any school which controls the content of student commencement speeches cannot receive funds under the act. Petitioner argues that because the guidance suggests that school authorities may not censor the content of student graduation speeches where the students retain "primary control over the content of their expression", school districts which censor speech in the manner done by Respondent cannot certify in good faith that they "have no policy that prevents or denies participation in constitutionally protected prayer" as required for receiving federal funds pursuant to 20 U.S.C. § 7904(b).

This argument is mistaken for two important reasons. First Petitioner mistakenly assumes, contrary to the facts he admitted and were found by both the trial and appellate courts in this matter, that he maintained the "primary control over the content" his speech. As noted above, Petitioner has made this incorrect factual assertion in the "questions presented" to this court as a basis for invoking its jurisdiction. The Petitioner never had "primary" control of the content of his speech. The Pleasanton Unified School District acting through the school principal, maintained control of all aspects of the commencement ceremony, including "primary control" over the content of Petitioner's

speech. In order for Petitioner to have had "primary" control over the content of his graduation speech, the school district would have had to adopt a "hands off" policy towards graduation speeches, which it did not. Therefore, any school district operating within the territory of the Ninth Circuit which maintains control over the content of student commencement speeches will not be in conflict with the Department of Education current "guidance" under 20 U.S.C. § 7904(a) and will be able to certify in good faith that it does not have a policy that unconstitutionally interferes with protected prayer. Controlling graduation speech content is not prayer interference.

The second and more obvious reason is that the Ninth Circuit decision has nothing to do with constitutionally protected prayer. Petitioner Lassonde was not exercising his constitutional rights to pray at the graduation ceremony. Rather, Petitioner was trying to deliver a christian sermon to the graduation audience and asking them to choose between following him in his belief in Jesus Christ as Lord or face, as the only other alternative, a doomed life. Petitioner's blatant attempt at sermonizing on the graduation stage had nothing to do with Petitioner's prayer rights under the Constitution.

II. The Ninth Circuit Decision In This Matter Does Not Create A "Split" Among The Circuits Requiring Reconciliation By This Court

Petitioner argues that the decisions of the Eleventh Circuit in *Adler v. Duvall County School Board*, 250 F.3d 1330 (11th Cir. 2001) and that of the Fifth Circuit in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992) are directly at odds with the Ninth Circuit decision in this case and the decision of the Third Circuit in *ACLU v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471

(3d Cir. 1996). This alleged "split" among the Circuits is an illusion invented by Petitioner. The decisions of the Eleventh and Fifth Circuits turn on the application of this court's analysis in *Lemon v. Kurtzman*, 43 U.S. 602 (1971) and application of the tri-partite test contained therein, to determine whether particular school board policies respecting commencement facially violate the establishment clause. The decision of the Third Circuit applying the decision of this court *in Lee v. Wiseman*, 505 U.S. 577 (1992) invalidated a school district ceremony benediction policy which was significantly factually different than the polices at issue in the Fifth and Eleventh Circuit decisions. The decision of the Ninth Circuit in this matter did not address the issue of policy at all and was solely concerned with a "free exercise" violation on very specific facts.

In *Adler v. Duval County School Board*, *supra*, and *Jones v. Clear Creek Independent School District*, the Eleventh and Fifth Circuits approved school policies which allowed students to choose graduation invocations and benedictions independent of any control by school authorities, provided that such exercises were "non-sectarian" and "non-proselytizing".

In *ACLU v. Black Horse Pike Regional Board of Education*, *supra*, the Third Circuit struck down a policy promoting student selected prayer at graduation ceremonies, which policy did not limit the student invocations or benedictions to "non-sectarian or non-proselytizing" statements. The Third Circuit decision was based on the "coercion" analysis in *Lee v. Wiseman*, *supra*. Based upon the factual distinctions between the decisions of those three Circuits, it cannot be said that prior to the Ninth Circuit's decision in this case a split existed between the decisions of the Eleventh, Fifth and Third Circuits on the issue of prayer at school graduation ceremonies.

The decision of the Ninth Circuit does not create a split. The facts of this case raise no issue implicating school district graduation prayer policy and no such claim is advanced in Petitioner's complaint filed with the district court. (App. D1-D16) Indeed, Petitioner maintained from the outset that neither he nor his legal counsel were ever aware of any school policy respecting the content of his graduation speech. (*See, e.g.*, Plaintiff's Additional Uncontroverted Material Facts, Fact number 12, App. G9)

Also, Petitioner's argument significantly ignores the fact that the Ninth Circuit issued a similar ruling on nearly identical facts in *Cole v. Orville Union High School District*, 228 F.3d 1029 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1228 (2001). *Cole*, apparently, did not create a "split" anymore than this matter does. Indeed based on the holding in *Cole*, the issues in this case appear to be well settled.

Petitioner attempted to insert a Christian sermon and not a prayer in his graduation speech, the content of which was subject to the primary and ultimate control of the Respondents. The coercive effect recognized in *Lee v. Wiseman*, *supra*, would have been present at the graduation had Petitioner been permitted to deliver his sermon. The holding of the district court, affirmed, by the Ninth Circuit, did not create any split among the decisions of the Circuits on this issue. No Circuit has upheld the right of a student to deliver a Christian sermon as part of a school controlled commencement speech at a public high school graduation.

III. The Ninth Circuit Decision Is Not An Unwarranted Extension Of Existing Precedent Of This Court And A Written Disclaimer Would Not Have Avoided A Violation Of The Establishment Clause

The Ninth Circuit's decision in this matter is wholly consistent with the principles enunciated by this court in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) and *Lee v. Wiseman*, *supra*, and reaffirms the Circuit's earlier decision in *Cole v. Orville Union High School District*, *supra*.

In *Santa Fe*, this court held that a school district policy authorizing a student elected by student vote to deliver a non-sectarian and non-proselytizing "statement or invocation" at varsity football games, violated the Establishment Clause. This court reasoned that such a practice would entangle the district impermissibly because the district's control over the activity and invocation would not only cause an objective observer to perceive that the district was endorsing the religious message in the invocation, but also would create an actual endorsement of religion by the public school. In *Lee*, this court barred a school district from inviting a Rabbi to deliver a non-sectarian, non-proselytizing prayer at its graduation ceremony. The court observed that high school graduation was a once in a lifetime event of singular importance and that adolescents were susceptible to peer and social pressure such that a dissenting student, not in agreement with the notion that state sanctioned prayer should be delivered at graduation, would be faced with the coercive dilemma of participating in the prayer against his or his conscience or missing his or her own high school graduation. In *Cole v. Orville Union High School District*, 228 F.3d 1092 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1228 (2001), The Ninth Circuit upheld a bar against a high school speaker from delivering a proselytizing christian sermon at a public school graduation ceremony by

applying the reasoning of *Lee* and *Santa Fe*. It was imperative here that the high school principal censor Petitioner's speech to prevent him from exhorting the assembled crowd to follow his particular religion or religious ideal, in this case, his Lord, Jesus Christ. Permitting Petitioner to preach to the school assembly in a blatant attempt to persuade them to follow his sect or creed would be a direct violation of the establishment clause as understood and explained in both *Santa Fe* and *Lee*. The Constitution does not confer upon Petitioner a special right or benefit to sell his brand of religion to a captive audience at a governmental ceremony, which has been convened for wholly non-sectarian purposes.

Petitioner argues that the "coercive effect" theory should not apply here because there is a distinction between forcing a non-adherent to listen to "prayer at a graduation as opposed to be forced to listen to pure speech" presumably including Christian sermonizing (with respect to its coercive effect). In the case of the former, Petitioner argues, a non-adherent who is forced to maintain a respectful silence along with others during a group prayer might feel that he or she has been subtly coerced into participating in the prayer. Whereas one who remains courteously silent during the exercise of "pure speech" (read: Christian sermon) is not equally coerced. This is a distinction without a difference.

Non-adherents in the audience who would have been forced to listen to Petitioner exhort them to join the Christian religion and follow his belief in Jesus Christ, his Lord, are not listening to "pure speech" or Petitioner's "views" but instead are forced to listen to a sermon and call by Petitioner to join and follow his creed. The "coercive effect" would be in place.

The Ninth Circuit correctly determined that no form of "disclaimer" could cure this coercive impact as Petitioner continues to suggest. Even with a disclaimer, the coercive dilemma remains: non-adherent students are given the unsatisfactory choice between attending the graduation ceremony and listening to a repugnant religious message or skipping an important life experience to avoid the offensive speech.

CONCLUSION

The petition should be denied because there is no sound reason for granting it. The Ninth Circuit's decision does not implicate the ability of any school to obtain federal funding for educational purposes, does not create a split among the Circuits that requires the intervention of this court, and, in view of the Ninth Circuit's earlier decision in *Cole v. Orville Union High School District*, *supra*, the decision in this case does not represent "an unwarranted extension" of this court's decisions in *Lee v. Wiseman*, *supra*, and *Santa Fe Independent District v. Doe*, *supra*.

Respectfully submitted,

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